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NO. 89-1498

In the Supreme Court of the United States

OCTOBER TERM, 1989

NEW ORLEANS STEAMSHIP ASSOCIATION,
Petitioner

versus

PLAQUEMINES PORT, HARBOR & TERMINAL DISTRICT,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the fees of the Plaquemines Port, Harbor and Terminal District are prohibited by 33 U.S.C. 2236, "Port or harbor dues" of the Harbor Development and Navigation Improvement Act of 1986 (33 U.S.C. 2231-41), which is Subchapter II of the Water Resources Development Act of 1986 (33 U.S.C. 2201-2311).

2. Whether the decision is in conflict with *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 99 S.Ct. 1813, 60 L. Ed.2d 336 (1979).

3. Whether the decision is in conflict with the holding in *South Central Timber Development v. Wunnicke,* 467 U.S. 82, 104 S.Ct. 2237, 81 L.Ed.2d 71 (1984).

4. Whether the decision fails to give effect to the Import-Export Clause of the Constitution, article I, section 10, clause 2.

5. Whether the decision fails to give effect to 33 U.S.C. 10, the Act admitting Louisian to the Union; 33 U.S.C. 5; and the Tonnage Clause of the Constitution, article I, section 10, clause 3.

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STATEMENT OF THE CASE

The Plaquemines Port, Harbor and Terminal District (hereafter "Port" or "Plaquemines") is a political subdivision of the State of Louisiana.[1] The Port is geographically coextensive with Plaquemines Parish (the Louisiana equivalent of a county). The Port is the 102-mile narrow stretch of land bordering the Mississippi River from New Orleans, Louisiana to the Gulf of Mexico. *New Orleans Steamship Association v. Plaquemines Port, Harbor and Terminal District.*[2]

There are approximately 9200 oceangoing vessels that annually navigate through the Port on their way to or from other ports along the Mississippi River, of which 3876 or so oceangoing vessels dock or anchor in the Port. Therefore, approximately 5400 [*sic*; actually 5324] vessels simply pass through the Port and do not stop, and are not charged any Port fees whatsover. Unlike most ports, Plaquemine neither owns nor operates wharves, docks, or other facilities. The facilities located within the Port are privately owned.[3]

As stated by the Court of Appeals:

> "By virtue of its police power and an agreement with the United States Coast Guard, the Port has primary responsibility for responding to fires, explosions, and other emergencies that occur within its territory.[7]"

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1. La. R.S. 34:1351-65.

2. 874 F.2d 1018, 1020 (5th Cir. 1989).

3. *Id.*.

The Court's Note 7 Contained the following:

> "Memorandum of Understanding Between the Coast Guard and the Plaquemines Parish Commission Council, approved by the Coast Guard, September 4, 1979; Letter from John L. Bailey, Captain, U.S. Coast Guard, to Jim Hoffman, Plaquemines Parish Fire Marshal (June 3, 1983) ("Maintenance of adequate disaster response capabilities for fires, explosions, and other similar incidents is the responsibility of local port operators, municipalities and public agencies.")."[4]

The Port operates two patrol/rescue/firefighting vessels, with a total of twelve crewmen on duty twenty-four hours, plus a full-time maintenance person; a ferryboat with firefighting capability; mobile pumps; and a 24-hour maritime communications net-work. In addition, the Port's governing authority, Plaquemines Parish, maintains fire and rescue equipment more powerful than it needs for its own use.[5] The services are set forth in detail in the District Court opinion. *New Orleans Steamship Association v. Plaquemines Port, Harbor and Terminal District.*[6]

The Port finances the services it provides by assessing a "Harbor Fee" for each day a vessel remains in the Port pursuant to its tariff. The Harbor Fee is waived for ships that anchor for fewer than 12 hours. The Port also assesses a "Supplemental Harbor Fee' against oceangoing vessels that load or unload cargo in the Port at the rate of

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4. *Id.*

5. *Id.*, n. 8.

6. 690 F.Supp. 1515, 1519 (E.D. La. 1988).

2-1/2 cents per ton for dry cargo and 1/2 cent per barrel for liquid cargo.[7]

Tariff fees are also assessed to the privately-owned terminal facilities, oceangoing barges, inland barges, tugs, tows, offshore supply vessels, and crew (passenger) boats. The ships that navigate through the 102 miles of the Port on their way to and from other ports upriver (such as the Ports of New Orleans, South Louisiana, and Baton Rouge) and do not anchor or exchange cargo in the Port are *not* assessed any fees whatsoever. *Plaquemines Port, Harbor and Terminal District v. Federal Maritime Commission*[8]

In the event of any fire, explosion or other emergency, the Port, under its Agreement with the U.S. Coast Guard, will respond and render emergency services.

For the purposes of this litigation only, New Orleans Steamship Association (hereafter "NOSA") and the Port stipulate that the fees are reasonable.[9]

There are no factual questions involved in this case. The facts were stipulated by the parties in the United States District Court.

The fees now charged by the Port, which are the subject of this case, were enacted on October 15, 1986, as a result of the Federal Maritime Commission (hereafter "FMC") finding on September 16, 1986, that certain exemptions in the Port's tariff were unlawful. The District

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7. 874 F.2d 1018, 1020.

8. 838 F.2d 536, 545 n.8, 548 n.11 (D.C. Cir. 1988).

9. 874 F.2d 1018, 1020, *as amended & reh. den.*, 891 F.2d 1153, 1154 (5th Cir. 1989).

of Columbia Circuit affirmed the FMC's Order in all respects.[10]. The Port submitted its tariff amendments of October 15, 1986 to the FMC which, on November 5, 1986, determined that the amendments complied with the FMC Order of September 16, 1986, directing the elimination of certain exemptions from the tariff.

NOSA had already filed a complaint on September 26, 1986 in the United States District Court for the Eastern Distsrict of Louisiana (No. 86-4238), seeking an injunction barring the Port from collecting fees. The complaint was dismissed as moot because of the tariff amendments of October 15, 1986. The decision was affirmed in *New Orleans Steamship Association v. Plaquemines Port, Harbor and Terminal District*[11].

In the meantime, in December 1986, NOSA filed another complaint to the FMC (Docket No. 86-31) which is stayed pending a final decision in this case, which was filed by NOSA on June 1, 1987.

The District Court dismissed NOSA's claims.[12]. The District Court decision was affirmed by the Court of Appeals.[13]

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10. 838 F.2d 536(D.C. Cir. 1988).

11. 816 F.2d 1074 (5th Cir. 1987).

12. 690 F.Supp. 1515(E.D. La. 1988).

13. 874 F.2d 1018: *as amended & reh. den.*, 891 F.2d 1153.

SUMMARY OF THE ARGUMENT

After five years of litigation before the Federal Maritime Commission, NOSA has now undertaken a broad based statutory and constitutional attack in the Federal Courts, alleging that the Port's tariff fees violate federal statutes and are unconstitutional.

The Port assesses reasonable fees to finance necessary and essential Port services such as fire protection, rescue operations, overall Port safety, and a marine communications system.

The legal authority for the tariff fees is set forth in *Clyde Mallory Lines v. Alabama.*[14] That court stated that a state port may impose a reasonable charge to provide services to users of the port without violating the United States Constitution.[15]

The fees are simply a means of reimbursing the Port for its costs of providing essential services. The Port has the primary responsibility for furnishing fire and rescue protection within its territory because of its firefighting Agreement executed with the United States Coast Guard.[16]

The Port is unique geographically. It is a 102-mile stretch of the Mississippi River; a large number of ocean going vessels (approximately 9200) pass through the Port annually, both inbound and outbound. A great number of

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14. 296 U.S. 261, 56 S.Ct. 194, 80 L.Ed. 215 (1935). (In its Petition for Certiorari NOSA incorrectly noted that the Alabama Supreme Court decision, *Clyde Mallory Lines v. State,* 229 Ala.624, 159 So. 53 (Ala. 1935), was reversed by the Supreme Court. That decision was affirmed.)

15. 296 U.S. 261, 267, 56 S.Ct. 194, 196-97, 80 L.Ed. 215, 219.

16. 874 F.2d 1018, 1020.

these oceangoing vesels (approximately 3876) anchor and/or dock at private terminal facilities within the Port, along with inland tows, tugs, inland barges, offshore supply vessels, and crew (passenger) boats, all of which pay the Port's reasonable fees for services rendered. The 5324 oceangoing vessels that simply pass through the Port and do not stop are not charged any Port fees whatsover. Private terminal facilities located within the Port also pay tariff fees to finance emergency response services.

The Port's uniqueness was recognized by the United States Court of Appeals, District of Columbia Circuit. That Court stated that the Port is geographically unique; that the Port does not own or operate wharves, docks or other waterside facilities; and that the Port operates without either tax support or revenues from wharf and dock facilities.[17]

NOSA contends that, since the Port has not been authorized by the Harbor Development and Navigation Improvement Act of 1986[18] ("HDNI") to impose tariff fees for emergency support services, its fees are in violation of HDNI.

HDNI applies to port or harbor dues imposed *only* in conjunction with a harbor navigation project. Nothing in HDNI indicates an intent by Congress to forbid fees that are authorized under *Clyde Mallory* and to restrict the manner in which states may impose harbor fees.

If NOSA's contentions regarding HDNI are found to

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17. 838 F.2d 536, 539-40, 543-44 (D.C. Cir. 1988).

18. 33 U.S.C. 2231-2241.

be correct then *every* harbor fee of *every* port in the nation would, theoretically, be in violation of HDNI, because nearly every port assesses a harbor fee to finance its fire boats. In Louisiana, the Port of New Orleans, the South Louisiana Port Commission, and the Greater Baton Rouge Port Commission, all located on the Mississippi River, have harbor fee provisions in their tariffs as reimbursement for the expenses of their fire boats.

NOSA's contentions that the tariff violates the commerce clause of the Constitution[19] ignore the clear principle of that clause - that only unreasonable burdens by a state on commerce will be struck down. The Port's fees, which assess a reasonable charge for services rendered to Port users, do not violate the commerce clause.

The Port's fees do not violate the import-export clause[20] and do not conflict with the policies behind that clause. The fees do not interfere with the federal government's regulation of foreign commerce; the fees fall on foreign and domestic vessels alike and do not single out foreign vessels for unfavorable treatment.

The nature of the Port's fees is nothing more than a means by which the Port apportions the cost of services (such as fire protection) among the beneficiaries of the services.

Fees charged by the Port are constitutional because the vessels paying the fees receive a service. NOSA's legal attacks based on the dormant and foreign commerce

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19. Art. I, sec. 8, cl. 3.

20. Art. I, sec. 10, cl. 2.

clauses, on the tonnage clause[21], on the import-export clause, on 33 U.S.C. 5, on 33 U.S.C. 10, and on the statute admitting Louisiana to the Union fail on that principle.[22]

ARGUMENT

I.

The Harbor Development and Navigation Improvement Act of 1986 Does Not Prohibit the Port's Fees

The Port contends that HDNI is not applicable to this case.

It is uncontroverted that the Port has not undertaken any harbor improvement projects and that the Port is not financing a harbor improvement.[23]

The fees now being collected by the Port are for emergency response services now being provided by the Port for the benefit of vessels in the Port.

The decision correctly concluded that HDNI applies when a port has undertaken a harbor improvement project and not otherwise.[24]

NOSA'S speculative interpretation of HDNI is in-

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21. Art. I, sec. 10, cl. 3

22. 874 F.2d 1018, 1027.

23. 874 F.2d 1018, 1024.

24. *Id.*

correct. HDNI specifically, at 33 U.S.C. 2236 (a)(2), expressly allows a port to levy charges to finance a harbor improvement project.[25] From this Section of HDNI, NOSA infers that the Port's fees violate HDNI because Congress implied disapproval of fees for emergency response services absent a project.

This interpretation by NOSA arises from its isolation of a special section of the statute without reference to any other section of of the Water Resources Development Act of 1986, of which HDNI forms a part.[26]

HDNI, at 33 U.S.C. 2236(a)(1), forbids ports from charging for emergency response services until after the projects are completed.[27] The Court of Appeals (Judge Wisdom) concluded that obviously this prevents ports from fraudulently charging for projects that are mere speculation.[28] It ensures that the fees will be paid by ships that benefit directly from improvements made under HDNI. [29] Again, there is no HDNI improvement present in this case.

The explicit permission under HDNI to recoup costs of a harbor improvement project does not establish that Congress intended to deny nonfederal ports the authority

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25. *Id.*

26. The Harbor Development and Navaigation Improvement Act of 1986, 33 U.S.C. 2231-41, is Subchapter II of the Water Resources Development Act of 1986, 33 U.S.C. 2201-2311.

27. 874 F.2d 1018, 1026.

28. *Id.*

29. *Id.*

to impose fees for services performed when no project has been undertaken.[30]

The Court of Appeals, at 874 F.2d 1025, correctly stated the purposes of HDNI:

> "The HDNI authorizes nonfederal ports to help plan projects initiated by the federal government, to initiate projects to be built by the federal government, and to build projects themselves. The HDNI also requires nonfederal ports to pay part of the costs of improving harbors and ports. Congress intends local involvment in planning and building to speed harbor improvements. Port fees levied for purposes other than harbor improvements do not threaten accomplishment of this aim. There is therefore no conflict between the fees and the Act invalidating certain fees." (Footnotes omitted.)

The court properly concluded that HDNI is designed to improve the planning and financing of harbor improvements and it does not address ports' long-standing authority to levy fees for emergency response services.[31]

ARGUMENT

II.

The Port's Fees Are Not Barred by the Foreign Commerce Clause Under the *Japan Line* Case

NOSA contends that the Port's fees are prohibited

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30. *Id.* at 1027.

31. *Id.* at 1025.

under *Japan Line, Ltd. v. County of Los Angeles.*[32] That case involves assessments on shipping containers for *ad valorem* taxation purposes wherein the County of Los Angeles sought to value cargo containers in Los Angeles as part of its assessment for *ad valorem* millage taxation. The tax revenues thus received, based on these assessments, were to be used for general purposes of the county government and not for port or harbor purposes as is the case here. The fees assessed vessels by the Plaquemines Port are used to finance the Port's primary responsibility for responding to fires, explosions, and other emergencies pursuant to the Port's Agreement with the U.S. Coast Guard.

The Port does not purport to have derived the power of its tariff enactment from any *ad valorem* tax assessment statutes of the State of Louisiana.

The Port's authority to charge tariff fees is derived from La. R.S. 34:1351-1365, specifically La. R.S. 34:1356 A., B. (amended by Act 93 of the 1986 Louisiana Legislature effective June 23, 1986) and La. R.S. 34:1360. The tariff under attack by NOSA here was effective on October 15, 1986. The power of the Louisiana Legislature to enact the statute is derived from Art. 14, Section 31 of the 1921 Louisiana Constitution which was continued as a statute by the 1974 Louisiana Constitution in Article 14, Section 16 (La. R.S. 34:340.1 *et seq.*), and Art. 6, Section 43 of the 1974 Louisiana Constitution.

The Port's enabling legislation contains authorization (La.R.S. 34:1354-1364) for *ad valorem* tax assessment revenue measures, and is intended to fund bonds issued for wharf and dock facilities. This measure has not been im-

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32. 441 U.S. 434, 99 S.Ct. 1813, 60 L.Ed. 2d 336 (1979).

plemented and is not now the basis for the expenditure of the fees collected. The fees of the Port are used for services to Port users. None of the fees collected are used to fund Port bonds, either directly or indirectly.

Thus, NOSA's reliance on *Japan Line* is incorrect. An assessment by the County of Los Angeles on Japanese cargo containers for *ad valorem* tax purposes, which revenues are for general parish government, is completely different from the specifically authorized (by Louisiana state law) and constitutionally-court santioned Port tariff, the revenues from which are specifically used to provide port and harbor services (including emergency response services) to port users (as sanctioned by *Clyde Mallory Lines v. Alabama.*[33]), and those fees are not used to provide for general parish government unless the parish government has provided specific services to the Port that are solely and directly Port-related.

NOSA's argument, raised in its Petition for Certiorari, that if HDNI does not apply to the Port then *Japan Line* is ignored because the nation has lost its ability to speak with one voice with respect to its foreign commerce, is incorrect.

The decision correctly stated that Congress has insured that the voice of the United States will be as unified as necessary because Congress has appointed the FMC to regulate fees imposed by local ports.[34]

In fact, NOSA has already successfully challenged previous fees of the Port (that are no longer in effect) before

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33. 296 U.S. 261, 56 S.Ct. 194, 80 L.Ed. 215 (1935).

34. 874 F.2d 1018, 1023.

the FMC under The Shipping Act, 1984.[35]

The Port is regulated by the FMC as a "marine terminal operator" under The Shipping Act, 1984.[36]

The Court of Appeals, D.C. Circuit, found that The Shipping Act, 1984 does create a reasonableness standard. The Court stated at 838 F.2d 546:

> "Section 10(d)(1) of the 1984 Act is, with reference to 'marine terminal operators,' a recodification of section 17 of the 1916 Act. Section 10(d)(1) requires that marine terminal operators 'establish, observe, and enforce just and reasonable regulations and practices.' 46 U.S.C. 1709(d)(1) (Supp. III 1985).[9] Section 10(d)(1) thus creates a reasonableness standard."

The Court's Note 9 stated:

> "Section 10(d(1) of the 1984 Act, 46 U.S.C. 1709 (d)(1) (Supp. III 1985) provides:
>
> No common carrier, ocean freight forwarder, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.
>
> "Section 17 of the 1916 Act (formerly 46 U.S.C. 816 (1982)) required in pertinent part:

35. 838 F.2d 536 (D.C. Cir. 1988).

36. *Id.* at 542-43.

> Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivery of property. Whenever the Commission finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice."

Additionally, as correctly noted by NOSA, The Shipping Act, 1984, creates an anti-discrimination standard.[37] This was held by the D.C. Circuit.[38]

Thus, the Port is subject to FMC jurisdiction for violations of both the reasonableness and the anti-discrimination standards of The Shipping Act, 1984.

NOSA's allegations, which are both explicit and implied in its petition for certiorari, that the Port's fees are not reasonable, or that ships are assessed fees that are not related to the amount of services rendered, or that the Port's fees are discriminatory, are properly before the FMC under the provisions of The Shipping Act, 1984. In fact, NOSA has filed a complaint before the FMC (Docket No. 86-31) which is stayed pending a final decision in this present case.

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37. 46 U.S.C. App. 1709(b)(11),(12).

38. 838 F.2d 536, 547.

ARGUMENT

III.

The Port's Fees Are Not Barred by the Commerce Clause Under the *Wunnicke* Case

NOSA's commerce clause challenge ignores the clear principle of the commerce clause: that only *unreasonable* burdens on interstate commerce by a state will be struck down.

As the Supreme Court, in *Clyde Mallory Lines v. Alabama* stated:

> "The present fee to defray the cost of a purely local regulation of harbor traffic is not an objectionable burden on commerce. State regulations of harbor traffic, although they incidentally affect commerce, interstate or foreign, are of local concern. So long as they do not impede the free flow of commerce and are not made the subject of regulation by Congress they are not forbidden. . . . And charges levied by state authority to defray the cost of regulation or of facilities afforded in aid of interstate or foreign commerce have consistently been held to be permissible."[39]

The District Court in this case held that the Port's tariff is no more than an incidental burden on interstate commerce; the benefits to the vessels by the Port's provision of emergency support services far outweigh any slight burden that may result.[40]

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39. 296 U.S. 261,267, 56 S.Ct. 194, 197, 80 L.Ed. 215,219 (1935).

40. 690 F.Supp. 1515, 1523 (E.D. La., 1988).

South-Central Timber Development v. Wunnicke[41] involved Alaska's requirement that timber taken from state lands be processed within the state prior to export. Alaska claimed that since there was a similar congressional policy the state had congressional approval.

The issues in *Wunnicke* and the issues in this case are completely diffenent. There was not at issue in *Wunnicke* a fee imposed on a reasonable basis for actual services rendered and received.

The Port's fees approximate $1.5 million per year. The fees are not only collected from ships but from privately-owned terminals, inland barges, tugs, tows, offshore supply vessels servicing oil platforms both within state waters and the Gulf of Mexico, and crew (passenger) vessels. NOSA simply does not want to pay its fair share of the services provided by the Port.

The *Wunnicke* decision does not prohibit the Port's fees. The prerequisite for applying dormant commerce clause doctrines does not exist here because the Port's fees have not been proved to impose "substantial" burdens on interstate and foreign commerce.[42]

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41. 467 U.S. 82, 104 S.Ct. 2237, 81 L.Ed 2d 71(1984).

42. 874 F.2d 1018, 1022.

ARGUMENT

IV.

The Port's Fees Do Not Violate the Import-Export Clause

The case before this Court is about reasonable fees charged by the Port for services such as fire protection for vessels. There is no charge by the port against cargo. One of the fees (the Supplemental Harbor Fee) is a vessel charge based upon the amount of cargo loaded or unloaded.[43]

The opinions in *Washington Revenue Department v. Stevedoring Association*[44], and *Michelin Tire Corp. v. Wages*[45] state the policies behind the import-export clause. Summarizing, those policies are 1) a concern that an impost or duty might interfere with the Federal Government's regulation of commercial relations with foreign governments; 2) fear that on account of such state taxation the Federal Government would lose an important source of revenue; and 3) a desire to maintain harmony among the States, which would be disturbed if seaboard States could tax goods merely flowing through their ports to other States not so favorably situated.

The Port's fees simply do not offend the policies behind the import-export clause. A fee for services such as fire protection is not an impost or duty proscribed by the import-export clause.[46]

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43. *Id.* at 1020.

44. 435 U.S. 734, 752-53, 98 S.Ct. 1388, 1400-01, 55 L.Ed.2d 682,698-99 (1978).

45. 423 U.S. 276, 285-86, 96 S.Ct. 535, 540, 46 L.Ed.2d 495, 503 (1976).

46. 874 F.2d 1018, 1023.

ARGUMENT

V.

The Port's Fees Are Not Prohibited by 33 U.S.C. 10, by The Act Admitting Louisiana to the Union, by 33 U.S.C. 5, or by the Tonnage Clause

a) *33 U.S.C. 10 and*
The Act Admitting Louisiana to the Union.

NOSA contends that the Port's fees violate the statute admitting Louisiana into the Union, and 33 U.S.C. 10. The statute codified states:

> "All the navigable rivers and waters of the former Territories of Orleans and Louisiana shall be and forever remain public highways."

The District Court opinion stated that the statute's intent is to preserve passage over the Mississippi River to all, prohibiting the imposition of a charge for the mere privilege of passage. The Port's fees meet this requirement and do not deter free passage on the River. Instead, the Port exacts a reasonable fee from those who dock in the Port to ensure the safe passage of all.[47]

The Court of Appeals correctly interpreted the statute which stated that the Mississippi River and the navigable waters leading into it and into the Gulf of Mexico shall be common highways without any tax, duty, imposts or toll imposed by said State. 2 Stat. at Large 703 (1812). The Court of Appeals stated:

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47. 690 F.Supp. 1515, 1521 (E.D.La., 1988).

> "These declarations proscribe fees for the mere privilege of navigating through waters, or imposts that create preferences for certain private parties over others. The Port charges for services, not for privileges. Its fees create no privileges. Courts have consistently distinguished fees for services from the tolls or imposts prohibited by statutes similar to 33 U.S.C. 10." (Footnotes omitted).[48]

The Supreme Court interpreted 33 U.S.C. 10 in *Hamilton v. Vicksburg, S. & P.R., Co.*,[49] and held that it did not impair the power which a state could exercise over its rivers.

In *Huse v. Glover*[50] the Supreme Court upheld the imposition of tolls charged for the use of locks built upon navigable waters under a similar statute.

b) *33 U.S.C. 5.*[51]

This new argument of NOSA was not raised in the District Court. It was not raised in NOSA's opening brief to the Court of Appeals. The first time the argument appeared was in NOSA's reply brief in the Court of Appeals, and NOSA then again raised it in its petition for rehearing of the decision.

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48. 874 F.2d 1018, 1024.

49. 119 U.S. 280,285, 7 S.Ct. 206,208, 30 L.Ed. 393,395(1885).

50. 119 U.S. 543,548-49, 7 S.Ct. 313, 315-16, 30 L.Ed. 487,490 (1886).

51. 33 U.S.C. 5 is set forth in its entirety in NOSA's Petition for Certiorari at pages 2 and 3.

The Port has not had the opportunity to respond to this new argument until now. The Court of Appeals correctly did not decide this issue because it was not raised in NOSA's opening brief.

The Port objects to this new issue being raised by NOSA in its Petition for Certiorari, but now responds with a full reservation of that objection.

NOSA contends the Port's fees are prohibited by 33 U.S.C. 5 and as a result of that statute the decision is at variance, if not in conflict with *Indiana Port Commission v. Bethlehem Steel Corp.*[52]

The Port contends that 33 U.S.C. 5:

> "No tolls or operating charges whatever shall be levied upon or collected from any vessel, dredge, or other water craft for *passing through* any lock, canal, canalized river, or other work for the use and benefit of navigation, *now belonging to the United States. . . .*" (Emphasis added.)

applies to the Mississippi River only in regard to charges by the United States within a state or port if that charge is for "passing through" a facility now belonging or that may be hereafter acquired or constructed by the United States.

Did the United States construct and does it now own the Mississippi River? Certainly not. God and/or nature had a lot to do with the creation of the Mississippi River. The statute, 33 U.S.C. 5, by its own terms, does not apply.

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52. 835 F.2d 1207 (7th Cir. 1987).

On the nebulous question of "now belonging to" the United States, this belatedly-raised issue to which we continue to object being considered, has been addressed by the courts through the years[53] to the effect, and summarized in the *Clyde Mallory* doctrine and other portions of this brief, and simply stated: that reasonable port charges can be imposed on port users commensurate with actual services available and rendered to them by the collecting entity.

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53. The tariff fees at issue are not collected from vessels passing through the Port, and the Mississippi River does not belong to the United States. This precept was again recently reiterated in *Louisiana v. Mississippi*, 446 U.S. 96, 98-99, 104 S.Ct. 1645,1647, 80 L.Ed.2d 74, 77-78 (1984), to the effect that the lands under the Mississippi River belong to the state. The issue is more complex and far-reaching than that, but it is as simple as the United States does not own the River and the River does not "now belong to the United States". Current Louisiana law on the subject is set forth to the same effect as the law in *Louisiana v. Mississippi, supra*, as to ownership of the Mississippi River beds. Should this Court deem it at all relevant, and cited subject to the reservation of our objection, the relevent provisions of the Louisiana Revised Civil Code are Articles 450, 452, 455, 456, 460, 665; the relevent Louisiana Statutes are La. R.S. 9:1101, 9:1102.1, 9:1102.2. This long-standing body of Louisiana law is all to the effect that title to lands beneath the Mississippi River are state-owned, the waters above are not subject to anyone's ownership; but the paramount powers of control of navigable streams rests with the United States. That control is subject to that general principle as set forth in 65 CJS Navigable Waters, Sections 10-12, 15, 16 and 15 CJS Commerce, Sections 79, 136, and more specifically, *Huse v. Glover*, 119 U.S. 543, 7 S.Ct. 313, 30 L.Ed. 487(1886), and the other cases cited in this opposition brief to the effect that reasonable port charges collected from port users for actual services rendered to them, have long been recognized as lawful. Absent a specific, clear provision of Congress to the contrary, not present here in any of NOSA's points, collection of those cost-of-service-fees is legal. Those fees are subject to review by the FMC as to reasonableness. Two U.S. District Courts (Judge Collins, Judge Sear), and two U.S. Courts of Appeals (Judge Bork, Judge Wisdom) have so held, and thus NOSA's petition for certiorari should be denied.

But, assuming for purposes of this opposition brief only that 33 U.S.C. 5 does apply to the Port, on the Mississippi River, the Port's fees are not collected from vessels for merely passing through the River or through the Port (which *is* the River between New Orleans, Louisiana and the Gulf of Mexico). The Port collects a reasonable fee from those vessels that dock or anchor in the Port over 12 hours to finance services such as fire protection. No fees are collected from vessels passing through the Port on their way to or from upriver ports.

The Port's harbor fee is defined in the tariff as "All commercial cargo vessels which dock, moor, or anchor within the District shall be assessed a Harbor Fee per each arrival within the geographical limits of the District, to assist in defraying the expenses of the administration and maintenance of the port and harbor, including the supervision of the shipping of the port, with the view of preventing collisions and fires, policing the river and riverfront, providing services of all kinds as required for an orderly and safe port operation, including reponse to vessels in distress with the means available, and to aid in extinguishing fires on vessels and equipment and in the cargo aboard such vessels or upon the public wharves, public banks and batures of the waterways of the district, and in the harbor, and upon the private wharves, docks, and immediately adjacient facilities connected thereto without any additional charge (except for the cost of supplies, material and equipment expended by the District in the performance of such services)." Tariff, Section I, Definitions.[54]

The Port's supplemental harbor fee is defined in the tariff as "A fee charged to supplement revenue necessary for the purposes herein set forth under "Harbor Fee" based

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54. 874 F.2d 1018, 1020.

on the weight of non-liquid cargo and on barrels of liquid cargo handled or transferred in midstream or when anchored at or moored to any dock, wharf, or mooring facility, or at a public wharf if, in the future, the District has any public wharves, which it does not now have." Tariff, Section I, Definitions.[55]

The harbor fee is assessed for each day a vessel remains in the Port District, moored or at anchor, on a graduated scale based on the vessel's length. Tariff Item 135A.[56] The harbor fee is waived for vessels that are detained for any reason in the Port that anchor in the General Anchorage not exceeding 12 hours. Tariff Item 136B. That Tariff Item states:

> "Item 136 Vessels Exempted From Harbor Fees:
> B. Vessels stopped within the District for the sole purpose of changing pilots, or because of inclement weather, or anchoring in the General Anchorage (see Item 50), remaining less than twelve hours within the limits of the District."

The supplemental harbor fee is assessed against oceangoing vessels loading or discharging cargo in the port at the rate of 2-1/2 cents per ton for dry cargo and 1/2 cent per barrel for liquid cargo. Tariff Item 135B(1).[57] This is premised on the logic of cargo transferred being a more reliable measure of port activity requiring port services, such as this Port renders, than the registered tonnage of a vessel sometimes used in other port tariffs. An example is a vessel with 50,000 registered tons loaded only to 30,000 tons. The Plaquemines Port tariff imposes the fees based on the 30,000 tons of cargo actually transferred.

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55. *Id.*

56. *Id.*

57. *Id.*

The approximately 5400 oceangoing vessels (58% of the total number of 9200 vessels that annually navigate the Port) that simply navigate through the 102 miles of the Port twice, and do not anchor or exchange any cargo in the port, *are not assessed any tariff fees whatsoever.* (Emphasis ours.)[58] Yet in the event of any emergencies the Port, under its Agreement with the U. S. Coast Guard, will respond and render necessary and essential emergency services, including fire protection.

The *Indiana Port Commission* case involved charges to vessels to defray the costs of constructing and maintaining a harbor that had been acquired by the United States. That court held that the charges violated the Federal Statute 33 U.S.C. 5.[59]

But, the facts here bear no relationship whatsoever to *Indiana Port Commission.* The Port's fees are not collected to defray costs of constructing a harbor. It is uncontroverted that the Port is not financing a harbor improvement. Therefore, the decision cannot be at variance or in conflict with the *Indiana Port Commission* case.

c) *Tonnage Clause.*

The decision did not misconstrue *Clyde Mallory Lines v. Alabama,* which held that a reasonable charge for general services is not a prohibited duty.[60]

The District of Columbia Court of Appeals, addressing NOSA's tonnage clause challenge in *Plaquemines v. FMC*[61] stated:

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58. 838 F.2d 536, 539, 545 n.8, 548 n.11.

59. 835 F.2d 1207, 1209-10.

60. 296 U.S. 261, 263, 56 S.Ct. 194, 196, 80 L.Ed. 215, 219 (1935).

61. 838 F.2d 536, 545.

"Our analysis of the tonnage clause is a direct application of the Supreme Court's decision in *Clyde Mallory Lines v. Alabama.* The Port of Mobile, Alabama policed the harbor to insure the safety and facility of the movement of vessels. It charged a fee for the purpose of meeting the expenses associated with the supervision of the port and the execution of its regulations. The Court noted that the tonnage clause prohibits 'all taxes and duties reguardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port.' The clause does not, however, prohibit charges made by a state authority for services rendered such as pilotage, wharfage, charges for the use of locks, or fees for medical inspections. The Court therefore upheld Mobile's fee.

"The *Clyde Mallory* Court distinguished the general services rendered by the Port of Mobile from earlier cases which involved a tax, levied in the guise of wharfage or medical inspections. ... The latter were condemned because they were imposed on all vessels entering a port whether or not they received the benefit of the services. In contrast, the services rendered by the Port of Mobile inured to all who entered the port. A reasonable charge for general services is not a prohibited tonnage duty. The services rendered by the Port also inure to all who use the Port of Plaquemines. All vessels, whether or not they catch fire or need rescue services, benefit from their availablility. Given the seriousness of explosions, fires or other accidents, particularly in view of the crowded condition of this stretch of the Mississippi River, it is especially important that rescue operations be swift and that fires be promptly extinguished." (Citations omitted.)

It is uncontroverted that the Port's fees are to defray the costs of providing emergency response services to all vessels passing through the Port.

Courts have consistently held that ships may be made to pay for services they receive. *See Clyde Mallory v. Alabama* (listing cases)[62]; *Cooley v. Board of Wardens* (local ports may charge for pilotage)[63]; *Vincent v. Foss & Crabtree.*[64]

The Port's fees easily meet the requirements of *Clyde Mallory.* As stated in the Court of Appeals' decision:

> "Emergency response services save lives, reduce damage to property, prevent fires from spreading to ships that would not otherwise need the services, and return the Port to full efficiency after an emergency. Second, the parties have stipulated that the fees are reasonable. Finally, the district court found a 'dearth of evidence' that Plaquemines's fees burden interstate commerce. The Port has the power to impose the fees."[65]

Clyde Mallory holds that port fees for services rendered to and enjoyed by vessels pass muster under the tonnage clause.[66]

CONCLUSION

There are no special and important reasons why

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62. 296 U.S. 261, 268, 56 S.Ct. 194, 197, 80 L.Ed. 215, 219.

63. 53 U.S. (12 How.) 299, 319-20, 13 L.Ed. 996 (1851).

64. 118 Fla. 717, 160 So. 49, 52 (S.Ct. Div. B. 1935).

65. 874 F.2d 1018, 1022.

66. *Id.* at 1023.

NOSA's petition for certiorari should be granted.

The decision of the United States Court of Appeals for the Fifth Circuit is not in conflict with the decision of another United States Court of Appeals.

The decision is not in conflict with either the Constitutional or statutory provisions involved.

Finally, the decision is not in conflict with any applicable decisions of the Supreme Court.

New Orleans Steamship Association, as is typical of a payer of any fees or taxes, in the all-American way, takes the services but does not want to pay for those services.

NOSA has a long history before various courts and the Federal Maritime Commission seeking essentially the same relief - not having to pay its fair share of reasonable tariff fees assessed by the Port to provide reasonable and necessary services of (primarily) emergency and fire response services.

NOSA reaches out to the enactment of the Harbor Development and Navigation Improvement Act of 1986. It is uncontroverted that there are no harbor improvements at issue in this proceeding; the Port is not engaged in any harbor improvement projects.

NOSA speculates that Congress, in enacting HDNI, has by inference prohibited port fees authorized under *Clyde Mallory* (now 55 years old), and the cases cited therein, and an entire body of law dating back more than 100 years, all to the effect that ports may levy reasonable charges to port users for providing fire, safety, police and other services actually rendered to and received by the users of the port.

HNDI, 33 U.S.C. 2231-41, is not at issue in this case. It is factually inapplicable to the Port's fees.

NOSA has urged through inferential hypotheses that by the enactment of HDNI there is clearly-stated congressional intent that forbids port fees being collected for services received by port users, but NOSA is wrong. HDNI only limits those fees as to specific harbor improvement projects pursuant to HDNI. In this case, no such improvement is at issue and NOSA cannot show clear congressional intent to overrule the well-founded logic that holds that a fee for services rendered is not a deprivation of constitutional rights but is clearly authorized pursuant to the long-held legal doctrine of *Clyde Mallory*.

If vessels receive port services commensurate fees charged by a nonfederal port are constitutional. NOSA's attacks upon the Port's fees based on the dormant and foreign commerce clauses, on the tonnage clause, on the import-export clause, on 33 U.S.C. 5, on 33 U.S.C. 10, and on the statute admitting Louisiana to the Union fail on this same principle, i.e., reasonable port fees may be collected for reasonable port services provided.

The Plaquemines Port, Harbor and Terminal District submits that New Orleans Steamship Association's petition for certiorari should be denied.

Respectfully submitted,

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